Workers Compensation Scheme
Local Government Association of South Australia

Submission to the Return to Work Act Review

9 February 2018

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Executive Summary

The Local Government Association Workers Compensation Scheme (LGAWCS) provides this submission in relation to the mandatory terms of reference for the review of the Return to Work Scheme, together with other non-mandatory matters raised in the Minister's statement to the House of Assembly on 14 November 2017.

The LGAWCS is the largest registered self-insured employer in South Australia covering a diverse range of occupations and risks associated with over 70 Local Government bodies in South Australia and employ in excess of 11,000 workers.

The LGAWCS has been in operation since June 1986 and is uniquely positioned to offer both a longitudinal perspective and qualitative assessment of the impact of the introduction of the *Return to Work Act 2014*, effective 1 July 2015.

The LGAWCS noted ReturnToWorkSA's (RTWSA) written submission with interest and the positive trends observed with the introduction of the *Return to Work Act*. The observation we make with regard to RTWSA's performance is that it can be measured from what is a "low base" and the initiatives undertaken by it have been embraced by self-insured's for a long time.

Overall, whilst there are improvements that can be made to the *Return to Work Act*, the LGAWCS are firmly of the opinion that this mandated review is too early to make any diverging recommendations such as those recommended in the Parliamentary Committee on Occupational Safety, Rehabilitation & Compensation Report of 14 November 2016. The LGAWCS takes the view that with the outcome of some precedent setting workers compensation disputes still in the balance of a Supreme Court review and financial stability is still being developed within RTWSA that ongoing commitment to the principles of the *Return to Work Act* should occur.

Please find enclosed in this submission recommendations and feedback in relation to the Terms of Reference. We look forward to the future stages of the Review and invite you to contact us should you require any further information.

Yours faithfully,

Tony Gray
General Manager

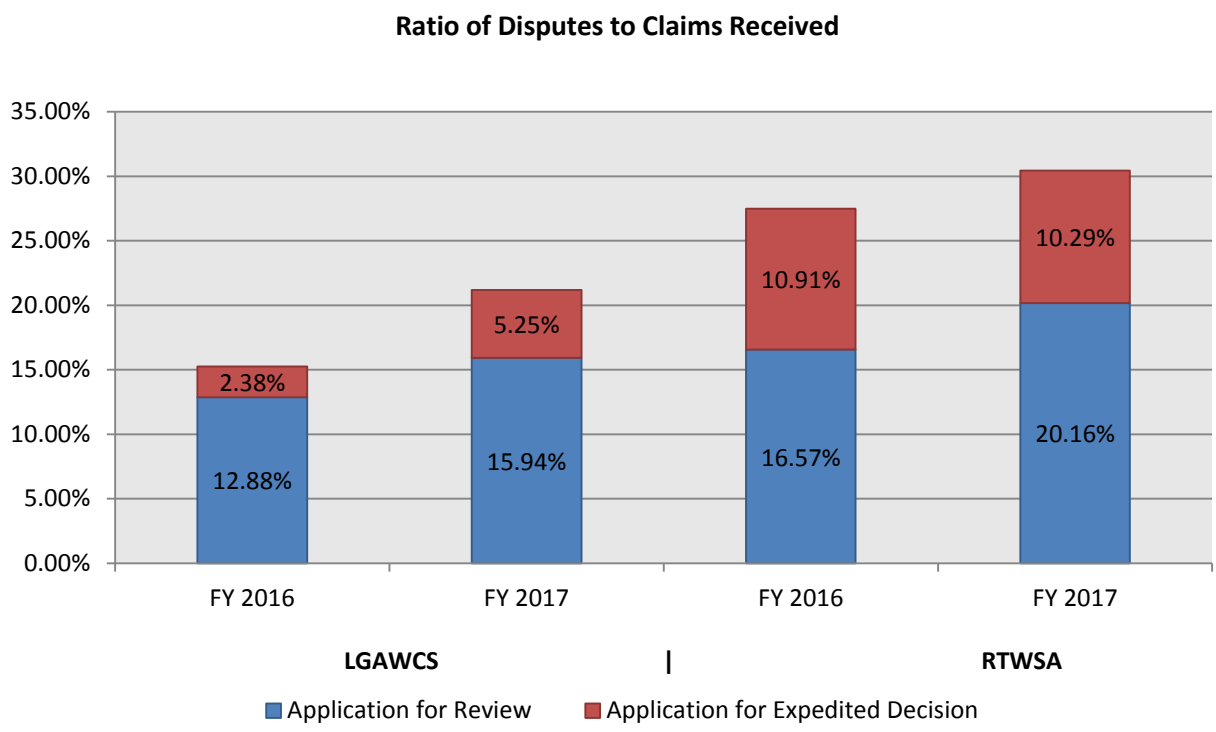
Term of Reference 1

The extent to which the Scheme, the dispute resolution processes, and the South Australian Employment Tribunal Act 2014 have achieved a reduction in the number of disputed matters and a decrease in the time taken to resolve disputes.

The LGAWCS' view is that the dispute resolution process under the auspices of the South Australian Employment Tribunal (SAET) is an enhancement of previous dispute resolution models and is efficient. Noted within RTWSA's submission, that they have experienced a reduction in overall litigation proceedings embarked upon within the SAET. The LGAWCS' experience has been that Return to Work disputes have remained at similar numbers to what was experienced prior to the introduction of the new Act. As a self-insured employer with a proven record of timely, evidence based decision making, the LGAWCS submits that there has been no significant change to the level of disputation between the former *Worker's Rehabilitation & Compensation Act* and the current *Return to Work Act*. This being said, the ratio of claims being disputed against the total number of claims received has risen since 1 July 2015, which is of interest, given overall claim numbers have dropped since 2014/15 by approximately 26%.

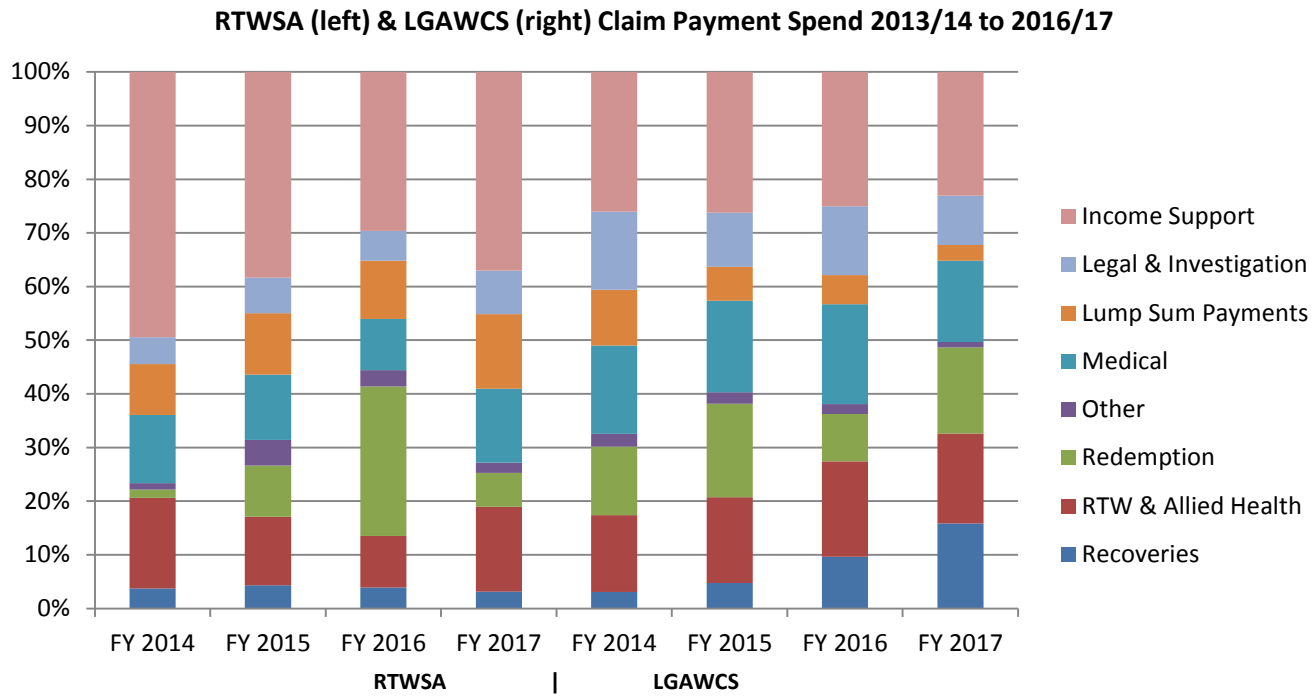
Please see below **Figure 1** which details the ratio of disputes to overall number of claims received for 2015/16 and 2016/17. Whilst the ratios for both RTWSA and LGAWCS has increased during the period concerned, it is noted that the ratio for Applications for Review on RTWSA matters is significantly higher at 20.16% for 2016/17 compared to 15.94% for the LGAWCS for the same period.

Figure 1:



As with RTWSA, the LGAWCS notes the new Act provides for costs on appeal to the Full Bench and Supreme Court regardless of the outcome, which has impacted on increased legal expenses. This has been particularly evident for the LGAWCS as can be seen in **Figure 2** below. Within the below graph a detailed analysis is provided comparing claim payment spend between RTWSA and LGAWCS for the periods 2013/14 to 2016/17 as a proportion of total spend for each relevant fund.

Figure 2:



Term of Reference 2

Whether the jurisdiction of the South Australian Employment Tribunal under this Act should be transferred to the South Australian Civil and Administrative Tribunal.

The LGAWCS sees no benefit, either in process or cost, for the specialised jurisdiction and processes of the South Australian Employment Tribunal to be transferred to the South Australian Civil & Administrative Tribunal.

Term of Reference 3

The extent to which there has been an improvement in the determination or resolution of medical questions arising under the Return to Work Act.

Determination and resolution of medical questions relate to the opinions of medical providers with the South Australian Employment Tribunal (SAET) as the ultimate decision maker.

The removal of Medical Panels SA as existed under the *Workers Rehabilitation & Compensation Act* is an improvement in the determination of medical questions, particularly as the opinion of a Medical Panel was not binding on the Tribunal.

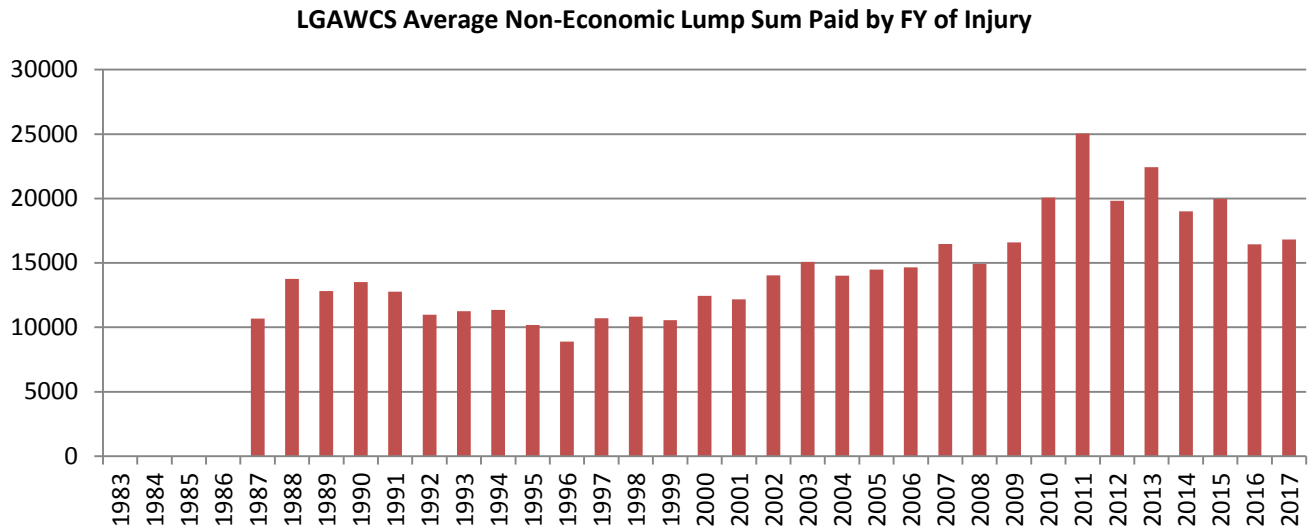
The LGAWCS considers medical questions relating to capacity, medical treatment, rehabilitation and suitable employment are amenable to resolution via the conciliation process, with hearing and determination by the SAET the ultimate outcome.

referral to an independent medical assessor pursuant to Section 121 of the *Return to Work Act* is also an appropriate option, which is yet to be optimally utilised (noting only 11 referrals made in 2016/17FY as reported within the SAET Annual Report). The LGAWCS notes with some interest that both worker and employer representatives hold a reservation towards such referrals primarily on the basis that the choice of the medical assessor is not their ultimate decision. Whilst representatives and employers are entitled to make such choices, the LGAWCS notes with some interest that divergent medical opinions are mostly evident, whereby the parties have selected their own medical assessors for the purpose of a compensation dispute.

This is most evident in relation to medical questions concerning Whole Person Impairment (WPI) assessment process and the “one size fits all” approach, benchmarked at 30% WPI to qualify as a seriously injured worker. Whilst RTWSA notes limitations within its own Impairment Assessment Guideline in relation to a worker choosing his or her assessor, the LGAWCS finds it disturbing that in excess of 44% of all of the 3,443 WPI assessments have been completed by six individual medical practitioners since 1 July 2015.

Analysis of LGAWCS claims data (see **Figure 3**) reveals that the average lump sum payment made for non-economic loss has been steadily increasing with a higher average experienced in latter years since the WPI process was introduced from 2009 under the former *Worker’s Rehabilitation & Compensation Act*.

Figure 3:



In addition to this, the LGAWCS notes the following further concerns with the WPI process:-

(i) extended entitlement to income support and medical expenses should not hinge on a purported objective assessment of impairment;

(ii) The "combination" of impairments produces unrealistic assessments and little relativity between injuries;

(iii) Impairment is often seen as a matter of aspiration, rather than assessment, in order to qualify for enhanced lump sum benefits (Section 56 for economic loss and Section 58 for non-economic loss) and also to exceed 30% in order to qualify as a seriously injured worker;

(iv) The RTWSA Impairment Assessment Guidelines, the AMA Guides and the assessor selection process result in anomalies, which have a major financial impact given the existence of entitlement to two lump sums (Section 56 and Section 58) underpinned by the assessment itself;

(v) The assessment of sequelae impairments (i.e. mastication/deglutition, upper and lower gastrointestinal tract, sexual dysfunction and so on) do not adequately account for whole of life conditions and are prosecuted to elevate impairments to an unrealistic, unsustainable and unfair level and constitute an incentive to illness/injury behaviour. The LGAWCS considers subsequent / secondary impairments should not be assessed or combined with the primary injury;

(vi) In these circumstances, where the SAET is the ultimate determiner of WPI, the LGAWCS anticipates increased disputation because the process is flawed, assessments are too high and the financial consequences are great;

(vii) The LGAWCS' view is that the threshold of 30% should not be reduced in any way. The LGAWCS does not support the provision of the *Return to Work Act* (Section 25(11)) which precludes the imposition of any obligation on a seriously injured worker to return to work. Whilst a worker might be assessed as having impairment at 30% or more, the assessment of impairment does not necessarily mean that the worker concerned is incapacitated or unable to undertake suitable employment and it makes no sense that a seriously injured worker should be relieved of any obligation to participate in the return to work process, if medically able to do so.

The Return to Work Scheme needs to be closely monitored over the ensuing 2-3 years and also a narrative test should be introduced and applied in conjunction with the 30% threshold to establish extended entitlement to compensation as a seriously injured worker only (i.e. a worker must be assessed as 30% WPI first and then be subject to a narrative test). In addition to this, we recommend that the RTWSA Impairment Assessment Guidelines are amended so that the "choice of an assessor" returns to the discretion of the Claims Manager or alternatively a rotational system is implemented whereby RTWSA facilitates an online/telephone booking service for Claims Agents and self-insured employers to book an assessor. This should facilitate fairness and balance between the medical practitioners receiving the same volume of referrals.

Term of Reference 4

The performance of Return To Work SA in managing claims, including Return to Work SA's outcomes in reducing instances of work injury.

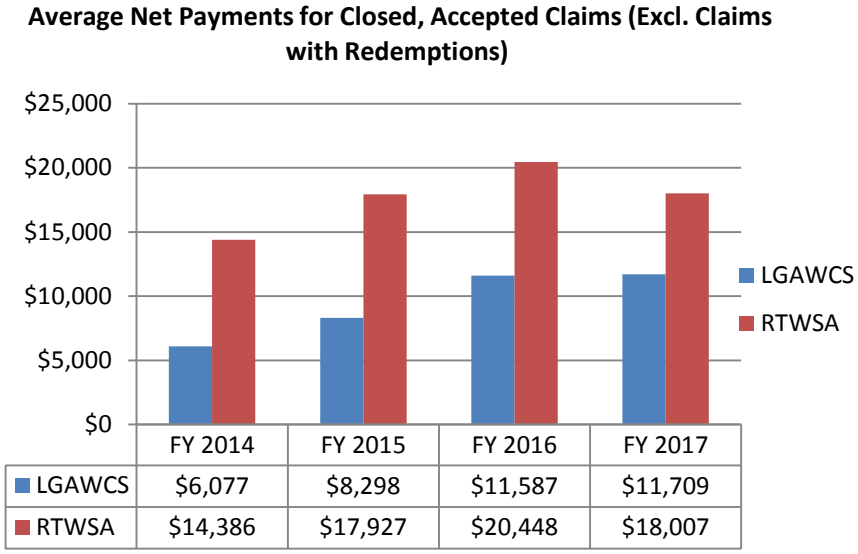
Given this matter is directed to the performance of RTWSA, we make no specific remarks on this Term of Reference.

Term of Reference 5

The performance of self-insured employers, including outcomes in reducing instances of work injury.

Since the introduction of the *Return to Work Act* the LGAWCS has recognised that the overall average cost of claims has been steadily increasing. This is consistent with the claims data published by RTWSA as at June 2017 and can be seen in **Figure 4** below detailing the average claims cost differential between the two entities.

Figure 4:

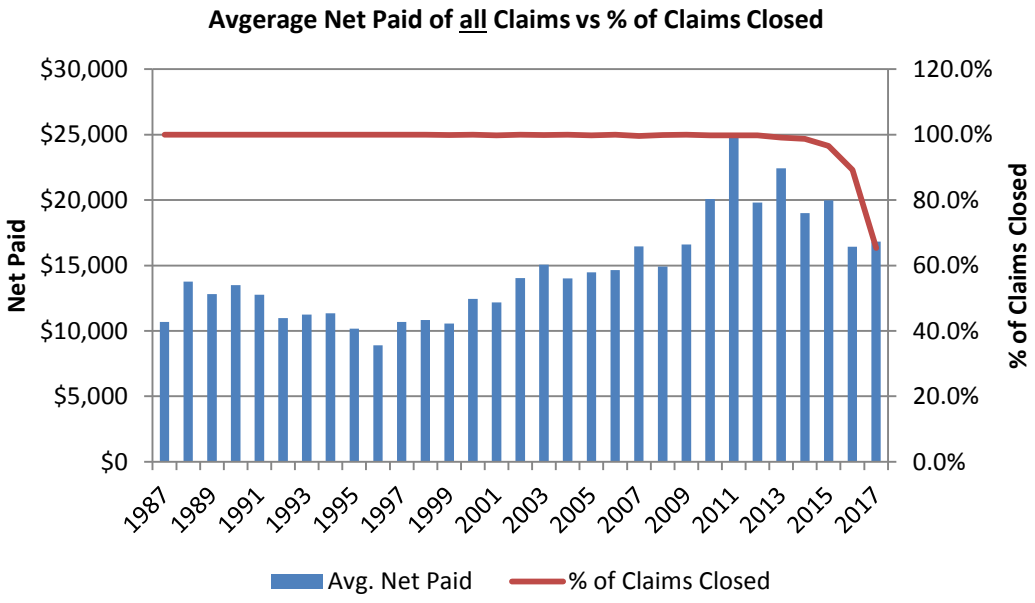


	FY 2014	FY 2015	FY 2016	FY 2017
LGAWCS	$6,077	$8,298	$11,587	$11,709
RTWSA	$14,386	$17,927	$20,448	$18,007

Whilst the LGAWCS have historically maintained a lower average claim expenditure when compared to RTWSA, there remains concern that the rate of growth in the average claim spend is far exceeding the general rate of inflation with an increase of 48% seen over the period 2013/14 to 2016/17. This issue is further highlighted when one considers the development cost of all claims and recognition is made with respect to recently incurred claims from 2015 – 2017 that still have a large volume of claims open (approximately 20% - 35% of those claims remain open), however claims costs are trending similar to the most expensive 2011FY (see **Figure 5**).

Furthermore, with the stabilisation of medical management following surgery intervention 1-2 years post the *Return to Work Act* now emerging, the LGAWCS will continue to grow average cost relevant to WPI and economic growth. See below **Figure 5** that demonstrates the above concerns utilising current LGAWCS claims data.

Figure 5:

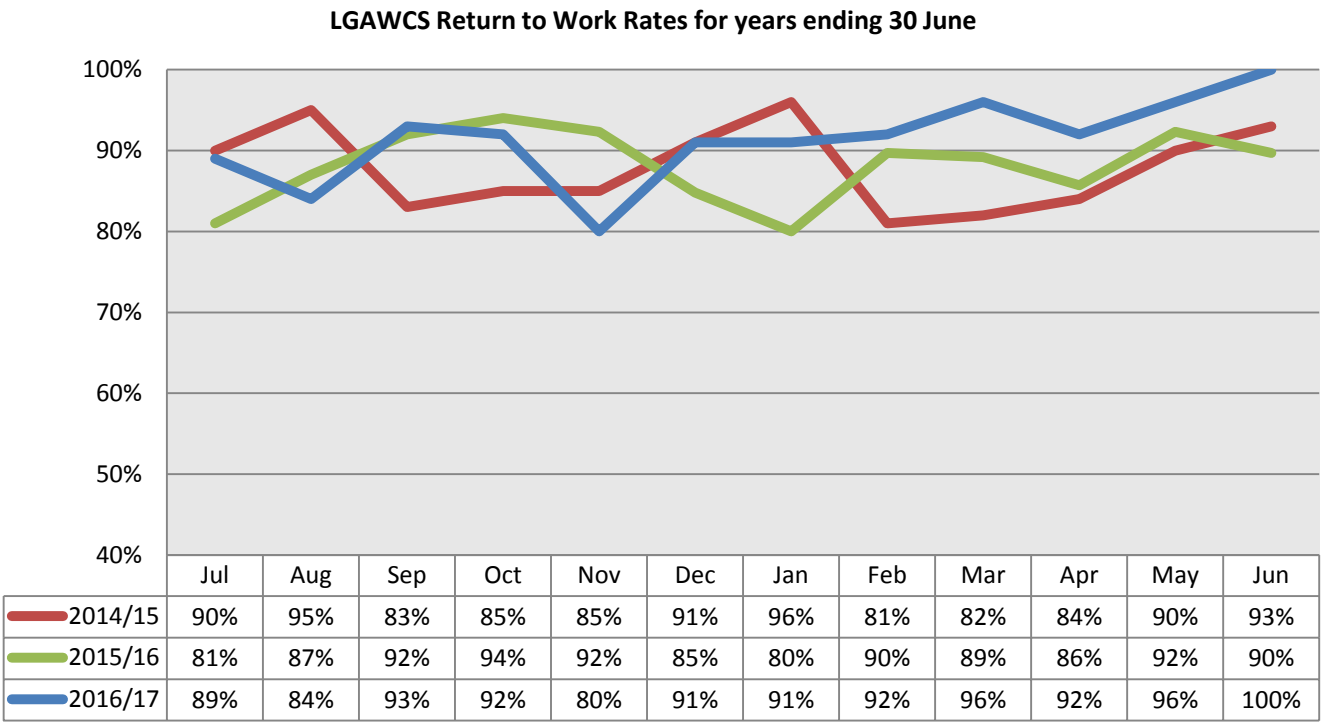


Term of Reference 6

Changes in return to work rates at key milestones outlining factors influencing any improvement or deterioration.

Since inception, the LGAWCS has maintained a high and successful return to work outcome rate that has significantly contributed to the financial viability of the LGAWCS. As seen in the below **Figure 6**, the LGAWCS has averaged a full return to work rate of 80% - 95% in any given month both pre and post the introduction of the *Return to Work Act*.

Figure 6:



	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun
2014/15	90%	95%	83%	85%	85%	91%	96%	81%	82%	84%	90%	93%
2015/16	81%	87%	92%	94%	92%	85%	80%	90%	89%	86%	92%	90%
2016/17	89%	84%	93%	92%	80%	91%	91%	92%	96%	92%	96%	100%

As such, the LGAWCS takes the view that legislation does not necessarily influence the success rate of those returning to work significantly, but more so, closely managed evidenced based early intervention is most effective in ensuring an early and successful return to work. RTWSA has enjoyed improved return to work rates since 1 July 2015; with the LGAWCS attributing this to a revised service delivery approach that sees mobile case managers being deployed at an early stage post injury. In effect, the LGAWCS has delivered a similar service for in excess of 30 years with an in-house Return to Work, Claims and Work Health Safety service, tailored to the needs of Local Government employees. The mere fact that there has been an improvement in the return to work rates cannot be associated in our view against the introduction of the *Return to Work Act*.

Term of Reference 7

Factors contributing to non-seriously injured workers failing to achieve a return to work within 2 years.

There are a number of factors that can influence a non-seriously injured worker failing to achieve a return to work at 2 years with each being unique in nature. The LGAWCS observations with this regard have noted the following high risk factors to these workers not achieving a return to work:

- Poor pre injury health and understanding that overall health and wellbeing will ultimately influence the rate of recovery
- Low education and understanding on the injury sustained
- High dependency on pain medications and drugs of dependence
- Cultural / social beliefs that pain means harm and rest / inactivity is the solution to this harm
- An unsupportive workplace upon returning to work
- Poor family and social supports at time of injury
- Poor relationship with treating medical practitioner

The LGAWCS' view is that the above high risk factors are amenable to change, provided they are identified early and managed appropriately by the treating medical and RTW practitioners involved in the injured worker's case. Testament to this, at the major 2 year milestone for transitional claims on 28 June 2017, the LGAWCS only had 10 injured workers that had their entitlements to compensation discontinued on the time limit basis. Of these 10 injured workers all but 3 had made a partial return to work back to paid employment. This is on the back of approximately 600-700 claims being received per annum in the 3 years prior to the introduction of the *Return to Work Act*.

Term of Reference 8

Any additional recommendations regarding re-skilling services to assist return to work outcomes.

The LGAWCS notes the submissions made by RTWSA in relation to the re-skilling services now offered by them. Overall the LGAWCS is supportive of these initiatives and whilst the LGAWCS has rarely required such services for its injured workers, there is clear value in these services being made available where required. Ultimately the success of these services will come down to the appropriate timing and delivery of these services to injured workers.

Term of Reference 9

Whether the Scheme has yet achieved financial stability and, if not, when the Scheme is likely to be mature and stable.

The LGAWCS has been in operation for 30 years. It has financial stability because of its holistic Work, Health and Safety principles and practices, culture and sound Claims and Rehabilitation management. These initiatives have been developed and implemented over a long period.

The financial impact of the *Return to Work Act* on the LGAWCS can only be measured once the Scheme/Act is mature and settled. The LGAWCS expects that can only be properly assessed potentially in 2-3 years henceforth. Reference is made in particular to the *Return to Work* Act precedential outcomes that are still making their way through the SAET and Supreme Court. This will provide further information and guidance along with potential financial impact this will have, albeit in the short and/or long term. This being said, the LGAWCS already notes that to date the average claim cost has increased as per the figures detailed earlier.

Furthermore, whilst RTWSA has reported full funding now with the introduction of the *Return to Work Act*, the LGAWCS has been able to maintain this financial stability prior to 1 June 2015. RTWSA has achieved significant financial turnaround with the fund in recent years despite average claim costs increasing. Furthermore, the LGAWCS notes that the total claims management fees paid by RTWSA to its two claims agents plus total employee expenses are 13.27% higher than the claims administration fee incurred by the LGAWCS on a gross contribution ratio.

Term of Reference 10

Any other recommendations consistent with the objects of the Return to Work Act.

The LGAWCS is familiar with the Parliamentary Committee on Occupational Safety, Rehabilitation and Compensation published on 14 November 2017 and comment in relation to the Committee's recommendations as follows:

Recommendation 1

The Committee has recommended that "early intervention strategies be implemented as soon as practically possible for all claims" and to ensure that workers that are not faced with the need to cover costs of such services recommends the "re-introduction of provisional liability" into the Scheme limited to cover the payment of early intervention services.

The LGAWCS' practice of early intervention has been long entrenched in Local Government. The LGAWCS sees no warrant for the reintroduction of provisional liability given the provisions in the *Return to Work Act* relating to interim payments. The right for interim payments to be recovered, whilst sparsely exercised in practice, is an important component of the *Return to Work Act* that maintains a balance and should be retained.

Recommendation 2

No change recommended to the use of "a significant contributing factor" in terms of the compensability of physical injuries, but that the use of "the" significant contributing factor in Section 7(2) be amended for psychiatric injuries and that the compensability test for such injuries revert to "a significant contributing factor".

The introduction of the *Return to Work Act 2014* was accompanied by an assertion that the "gateway" provisions would be stricter and more readily enforced than existed under the *Workers Rehabilitation & Compensation Act*. The LGAWCS' experience in relation to recent SAET decisions is that the "new test" relating to "a" or "the" significant contributing cause does not, in practice, provide anything like a stricter threshold test.

It is the LGAWCS' position that both physical injuries and psychiatric injuries should be assessed by reference to a test involving "the significant contributing cause". This is particularly necessary for the growing prominence of degenerative physical conditions relevant to the natural long term ageing process, as opposed to short term work related factors.

Recommendation 3

That the term "seriously injured worker" in the Act be replaced with the term "worker with high needs" for workers whose permanent impairment exceeds 20% and "worker with highest needs" for workers whose permanent impairment exceeds 30%.

The LGAWCS' view is that the terminology is not as important as the ramifications of WPI assessment. The LGAWCS remains concerned that this pivot (an assessment of 30% or more) to differentiate entitlements is flawed both in principle and in application for the reasons mentioned earlier. The LGAWCS does not support this recommendation and/or reduction to rate either as a serious injury or high needs for the reason as stated.

Recommendation 4

That the Act include a narrative test to supplement the already prescribed whole person impairment assessment process (for determination of seriously injured worker status) and that doctors be trained in the use and application of such narrative test.

The LGAWCS considers there is no reason in principal why a "seriously injured worker" should be relieved of any obligation to participate in a rehabilitation and return to work process whereby a capacity to participate in some

form of employment is medically advised. In conjunction with this concern as to the level of assessment, the LGAWCS supports the introduction of a narrative and subjective test so that the classification of being a seriously injured worker is not solely determined by impairment but should also have regard to subjective factors relevant to the worker, their capacity to work and the employer.

Recommendation 5

That the coverage of payment of medical expenses be extended so there is no 12 month limit for reasonable costs associated with medication and treatment for which there is evidence that treatment is required to maintain a worker remaining at work.

In the LGAWCS' view there should not be any change to the extent to which a worker is entitled to medical and like expenses. We note that the coverage of medical expenses beyond the current legislated time limit has only marginally impacted a small number of injured workers within the Local Government sector. These workers have been provided with medical management assistance well before the end date to assist with a treatment plan thereafter, if required.

Recommendation 6

That recovery/return to work services be provided for the 12 month period post the cessation of income support.

Recovery/return to work services are preserved after the cessation of income support as these services are a species of medical expenses. Needless to say, the LGAWCS has continued to offer recovery/return to work services to all injured workers irrespective as to whether their claim is rejected or entitlements have ceased due to lapse of time, where there is an incapacity to perform suitable employment.

Recommendation 7

That the reasonable costs associated with future surgery be payable by the Scheme without the precondition that surgery be pre-approved.

The current provisions relating to pre-approval of surgical treatment are adequate, safeguarded through the access to the SAET and provide a reasonable basis as a check against over servicing and superfluous treatment. The primary question in relation to provision of future medical and in particular surgical expenses relates to the question of causation. Whilst the pre-approval process provides an important review process before surgical costs are incurred, it is noted that the imposed time limit to make such an application as outlined within the *Return to Work Act* has contributed towards a higher level of disputation for no other reason than to protect a worker's "potential need" for future surgery. Given this, the LGAWCS recommends that the pre-approval process remains in place; however we see some benefit in the imposed timeframe to make an application being removed so that

an injured worker can bring about an application at the time to which they are recommended for surgery and the merits of surgery are determined based upon the medical advice available at that time.

Recommendation 8

That the method of calculation of 104 weeks' entitlement be based on the aggregate period of incapacity for work whether consecutive or not.

The LGAWCS does not support or believe there should be any change to the calculation of the aggregate period of incapacity for work from the current requirement. The process is straight forward and has led towards a decrease in disputation concerning weekly payment entitlements and as supported in the RTWSA submission.

Recommendation 9

That the inclusion of common law in the 2014 Act be further reviewed.

The LGAWCS' view is that it is too early to review the common law provisions contained in the *Return to Work Act*. To date, the LGAWCS has not received a claim for common law made under the *Return to Work Act*.

Recommendation 10

The Committee recommends the Minister ensures RTWSA holds all employers accountable in providing suitable employment and that RTWSA develop a key performance measure for agent compliance with Section 18 and that the outcomes be provided to the Committee every 12 months.

The provisions of Section 18 of the *Return to Work Act* provide sufficient protection and reinforce the statutory obligation for the provision of suitable employment. Nonetheless, it is noted that this recommendation is directed towards RTWSA and its claims agents to comply with the requirements of Section 18 of the *Return to Work Act*. This is counterintuitive given the requirements of Section 18 rest firmly with the employer and it is their ultimate responsibility to provide suitable employment and respond to any dispute applicable.

Recommendation 11

That the Minister review the compliance of RTWSA meeting the Statement of Service Standards and report back within 12 months.

The LGAWCS agrees that the ongoing compliance of RTWSA with the service standards should be regularly reviewed.

Recommendation 12

That the Minister direct RTWSA review information available on its website and communication of information to injured workers.

This recommendation is specific to RTWSA with the LGAWCS having no particular comment to make at this time.

Recommendation 13

That the Minister review and advise the Committee about the impact of reduction of spending on rehabilitation/return to work service providers.

This recommendation is specific to RTWSA with the LGAWCS having no particular comment to make at this time.

Recommendation 14

That the Minister require RTWSA to review and advise on improvements of services to regional injured workers.

This recommendation is specific to RTWSA with the LGAWCS having no particular comment to make at this time.

Recommendation 15

That the Minister cause RTWSA to hold regular forums to provide information to injured workers exiting the system with agencies who can assist.

This recommendation is specific to RTWSA with the LGAWCS having no particular comment to make at this time.

Recommendation 16

That the Act be amended to allow workers with a psychiatric injury to receive payments for non-economic and economic loss.

The LGAWCS opposes any suggestion that a psychiatric injury results in an entitlement to lump sum payments pursuant to Section 56 and Section 58 of the Act. Such a proposal has potential to significantly increase the LGAWCS' costs against a background where the entitlement to a lump sum payment is subject to an assessment of WPI almost entirely dependent upon the worker's subjective complaint and where the permanency of a psychiatric impairment is situational and occasionally questionable.

Recommendation 17

That the Act be amended to require that workers receive financial advice for any lump sum payment of over $50,000.00.

The LGAWCS sees no warrant for the provision of mandated financial advice, in addition to the protections that already exist in relation to a redemption. The LGAWCS notes that financial and professional advice is already required on any lump sum redemption of weekly payments.

Recommendation 18

That the Minister require RTWSA to communicate to an employer the reason for any change to their premium.

This recommendation is specific to RTWSA with the LGAWCS having no particular comment to make at this time.

Summary

In the LGAWCS' view the introduction of the *Return to Work Act* providing protection in relation to employment (Section 18), income support for up to two years, a Section 58 lump sum for non-economic loss, a Section 56 lump sum for economic loss in fact provide enhanced protections and coverage for injured workers. The overall operation of the Return to Work Scheme should be the subject of further review in 2-3 years so that the true impact can be assessed and the development of the WPI assessment scheme can be monitored accordingly.

Whilst any workers compensation jurisdiction will always grapple to ensure there is an adequate balance between injured worker entitlements and a financially sound and capable insurance fund we ultimately consider that the *Return to Work Act* has attained, for now, (and until a reasonable timeframe enables the *Return to Work Act* principles to grow) a reasonable balance between the parties. Minor amendments to the *Return to Work Act* may be beneficial, however it is the LGAWCS' experience that time is required to allow the new Return to Work Scheme to mature.

Thank you for enabling the opportunity to provide our submission to the Return to Work Act Review. We would welcome the opportunity to meet with you and/or provide further information on any of the above details supplied.

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